Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

RHONDA J. PARRISH,

Petitioner,

v.

RIVERVIEW NURSING HOME, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER CAUSATION IN EMPLOYMENT DISCRIMINATION CASES IS PROVEN BY SHOWING THAT DISCRIMINATION WAS A "MOTIVATING" OR "SUBSTANTIAL" FACTOR IN AN ADVERSE DECISION OR INSTEAD REQUIRES THE MORE BURDENSOME SHOWING THAT THE EMPLOYER WAS "SUBSTANTIALLY MOTIVATED" BY DISCRIMINATION?

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioner Rhonda J. Parrish, an African-American employee who was terminated from employment, the plaintiff-appellant below, and Respondents Riverview Nursing Home, Inc. and Joseph C. Pino, the corporate employer for whom Ms. Parrish worked and its administrator, the defendants-appellees below.

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No. _____

IN THE
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October Term, 1993

RHONDA J. PARRISH,

Petitioner,

v.

RIVERVIEW NURSING HOME, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Rhonda J. Parrish respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 7, 1994.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Sixth Circuit are not reported. They have been reprinted, along with an order denying a petition for rehearing *en banc*, in Appendix A. The judgment and opinion of the United States District Court for the Southern District of Ohio and the Master's Report from the Magistrate Judge of that Court are also not reported. They have been reprinted in Appendix B.

JURISDICTION

This action arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and jurisdiction was vested in the United States District Court for the Southern District of Ohio by 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5(f). A charge affidavit had been timely filed with the Equal Employment Opportunity Commission (EEOC) on April 7, 1989, and a right-to-sue letter was issued by the EEOC on July 7, 1990. A civil action was then timely commenced on October 9, 1990.

After trial during the week of July 13, 1992, before a Magistrate Judge acting as a Master pursuant to 42 U.S.C. §2000e-5(f)(5), a Master's Report was issued on September 23, 1992, and objections were timely filed on November 9, 1992. Upon a three-paragraph order, the United States District Judge denied those objections and dismissed the action in a judgment filed on December 31, 1992.

Pursuant to 42 U.S.C. §2000e-5(j), the Court of Appeals for the Sixth Circuit had jurisdiction over the appeal filed on January 29, 1993. Upon an oral opinion issued from the bench, a panel of the Court of Appeals for the Sixth Circuit entered an order on March 7, 1994,

affirming dismissal. A petition for rehearing *en banc* was denied by an order entered on April 8, 1994.

This Court's jurisdiction arises under 28 U.S.C. §1254.

STATUTORY PROVISION INVOLVED

Section 703, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)[1]

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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[1] This action arose before the effective date of the Civil Rights Act of 1991 and is governed by Title VII provisions before they were amended. Notably, the core statutory phrase -- "because of such individual's race" -- has not been amended. The amendment stating the same-decision defense provides some guidance, however, by declaring that "an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2(m).

STATEMENT OF THE CASE

The facts pertinent to this Petition can be briefly stated. Finding that Rhonda J. Parrish's evidence presented "an extremely close case," the Master concluded that she failed "to prove, by a preponderance of the evidence, that her discharge was ***substantially motivated*** by racially discriminatory reasons." *Master's Report* at B-16 (emphasis noted).[2]

This hybrid causation standard -- "substantially motivated" -- was critical to the Master's resolution of so "extremely close" a case. After his review of some of the evidence, the Master explained: "Undoubtedly it could be inferred that he would not have made the same decision had Parrish been white, but I do not believe that Parrish has met her burden of proving by a preponderance of the evidence that Pino was ***motivated in substantial part*** by Parrish's race when he chose to discharge her on March 8, 1989." *Master's Report* at B-22 (emphasis noted).

The undoubted inference the Master described arose from trial evidence, which he credited, that demonstrated a record of disparate treatment of Ms. Parrish, the only African-American Charge Nurse employed by Respondents then or since; deviation in her treatment from established procedures; and concocted allegations against Ms. Parrish. Other evidence admitted at the trial buttressed the inference that race was at least a motivating factor in the discharge decision.

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[2] The basis for jurisdiction in the trial court is described under the heading, "Jurisdiction," above.

Ms. Parrish was subjected to rank stereotyping. She was criticized for having an overfamiliar tendency, singing and dancing with residents, and being too loud or chatty. *Master's Report* at B-16-17. In quoting Ms. Parrish at a meeting she had sought regarding the disparate treatment, the decisionmaker attempted to capture what he must have perceived was her dialect, lack of good grammar, or terminology: "'I'm sittin here just tellin the truth.'" "I'm not here to dog Kathy out . . . .'" "'She don't have to listen . . . .'" "'Cause like I said, they be talking to me.'"[3]

The procedural deviation mentioned by the Master was the unusual treatment of a nonminority candidate's application whose availability precisely coincided with the timing of Ms. Parrish's discharge. *Master's Report* at B-14;18. Further deviations, both procedural and substantive, fuel the inference that race was at least a motivating factor. Progressive discipline was suddenly abandoned midstream when the nonminority candidate became available. (Pl. Ex. 15; Pino at I-46-51)[4]. Ms. Parrish had been recognized just a few months earlier as "Employee of the Month," being praised as part of that recognition, and was known for her loving care of residents and diligent attendance. (Pino at I-66;88; Parrish at II-65).[5]

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[3] *Meeting Notes* (Pl. Ex. 38). The transparent excuse that these portions of the notes were meant to be verbatim was given by Respondents; no reference was made to this evidence by the appellate panel, the District Judge, or the Master.

[4] Citation to the trial transcript refers to the witness, the volume, and page number.

[5] The only witness who testified that the "Employee of the Month" was a random drawing was the decisionmaker, and he was immediately impeached; no reference was made to this evidence by the appellate panel, the District Judge, or the Master.

The Master's conclusion was predicated on a defense theory that Ms. Parrish's failure to complete a narcotics count form in a timely fashion on a day she came to work sick and ended up in the hospital was really just the "last straw" in a cumulative record of problem performance. *Master's Report* at B-14;22.[6] Two defects of that theory were seemingly recognized, but not used in the Master's or the reviewing judges' analyses: first, Ms. Parrish had twice been falsely accused of failing to complete the form in a timely fashion, a credibility determination the Master ***actually made***, *Master's Report* at B-12;20; and, second, the decisionmaker stated on five pretrial occasions, two under oath, that the only reason for discharge was Ms. Parrish's failure to complete the form in a timely fashion.[7]

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[6] In addition to the disparate treatment of other Charge Nurses who failed to complete the form in a timely fashion, the evidence was that only two residents were prescribed narcotics, and the timing of the count was not even important enough for a blank to be provided on the form for time to be entered. (Pl. Ex. 33; 34; Pino at I-37;38;46; Gray at I-225;232; Parrish II-42).

[7] The Master did refer to the termination conversation: "No mention was made during that meeting of any cumulative effect of the past unfavorable evaluations she had received, or other instances of "unprofessional" conduct or failing to document or record treatment or medications, other than the failure to complete the count sheet at the beginning of her shift." *Master's Report* at B-14. When Ms. Parrish returned with her Pastor a few days later to seek reinstatement, the decisionmaker reiterated the single, rather than cumulative, reason. Then, in both a letter and under oath at an unemployment compensation hearing and under oath at a pretrial deposition, the decisionmaker again explained that prior job performance was ***not*** the basis for Ms. Parrish's discharge. (Pino at I-50-56). No reference to this remarkable impeachment of the defense theory was made by the appellate panel, the District Judge, or the Master.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION ON WHICH FEDERAL APPELLATE COURTS LACK A UNIFORM STANDARD.

In Title VII, Congress prohibited discrimination against an employee "because of" her race. 42 U.S.C. §2000e-2(a). The legislative purpose is clear: "The bill simply eliminates consideration of [prohibited factors] from the decision to hire or promote." 110 Cong. Rec. 7218 (1964)(Sen. Clark); "What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment." 110 Cong. Rec. 13088 (Sen. Humphrey). The goal is "racially neutral employment and personnel decisions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

The causation standard was addressed long ago in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n. 10 (1976): a Title VII plaintiff need ***not*** "show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies, . . . no more is required to be shown than that race was a 'but for' cause." This "but-for" causation standard was later extensively discussed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and carefully applied in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1991).

A plurality in *Hopkins* described the causation standard: "The critical inquiry, the one commended by the words of [Title VII] is whether [race] was ***a factor*** in the employment decision at the moment it was made." 490 U.S. at 241 (emphasis noted). Then, the majority in

Biggins added that the statutory prohibition against age discrimination "requires the employer ***to ignore***" a prohibited factor such that "the employer's decision is ***wholly motivated*** by factors other than" the prohibited one. 113 S. Ct. at 1706-07 (emphasis noted). That prohibited factor must "not have figured in this decision" or "played a role" in a termination. *Id.*

The phrasing of the causation standard at the heart of this Petition -- motivating or substantial factor -- can be traced to *Village of Arlington Hgts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 271 n. 21 (1977), and *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977), and has routinely been used ***in the alternative***. *NLRB v. Transportation Mngt. Corp.*, 462 U.S. 393, 410 (1983)("a substantial or motivating factor in the adverse decision").

Unfortunately, the causation standard has been so variously described and applied that some federal appellate courts have become confused. Whatever the value of varied phrasing in other pursuits,[8] the law benefits from precise, uniform definitions of legal terms, particularly quintessential ones such as those governing causation that need to be explained in jury instructions in future Title VII cases.[9] As this Court observed in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2756 (1993), "Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, ..."

A hybrid causation standard raises the burden of proof a Title VII plaintiff must satisfy beyond what

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[8] Amorous entreaties might well benefit from diverse phrasing. Elizabeth Barrett Browning, "How Do I Love Thee?," *The Random House Treasury of Best-Loved Poems* 18 (N.Y. 1990)("How do I love thee/Let me count the ways.").

[9] 42 U.S.C. §1981a(c) amended Title VII to provide for jury trials when damages are sought.

Congress or this Court's precedent permit. As the burden imposed on Ms. Parrish reflects, the Sixth Circuit has combined alternative descriptions of the causation standard into a hybrid standard: "a significant motivating factor." *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991). There and in *Gagne v. Firestone Tire & Rubber Co.*, 881 F.2d 309, 315 (6th Cir. 1989)(emphasis noted), the Sixth Circuit cited *Price Waterhouse* for the proposition that causation requires a demonstration that "an impermissible discriminatory animus was a ***substantial motivation***."

The federal appellate circuits suffer from the confusion.[10] Joining the Sixth Circuit are panels in the First, Second, Fourth, Seventh, Tenth, Eleventh, and Federal Circuits. *Pontarelli v. Stone*, 930 F.2d 104, 115 (1st Cir. 1991)("a substantial factor motivating the initiation of the investigations"); *Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993)("a substantial part of the motivation for a prosecutor's peremptory challenges"); *White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991)("motive to discriminate was a substantial factor"); *Pearl v. Keystone Consol. Ind., Inc.*, 884 F.2d 1047, 1050 (7th Cir. 1989)("race was not a substantial motivating factor"); *Purrington v. University of Utah*, 996 F.2d 1025, 1031 (10th Cir. 1993)("the discriminatory factor was a substantial motivating reason for the decision"); *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993)("a substantial motivating factor in the employment decision"); *Webster v. Dep't of the Army*, 911 F.2d 679,

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[10] The conflict in the circuits includes intracircuit conflicts which exist in part due to miscitation of the relatively recent decision in *Price Waterhouse* and the absence of focus in a particular appeal on the causation standard. For example, *Price Waterhouse* is improperly cited in *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 n. 5 (10th Cir. 1992), to support a causation standard that "an improper factor was a substantial motivation in the challenged decision."

687 (Fed. Cir. 1990), *cert. denied*, 112 S. Ct. 181 (1991)("significant motivating factor").

Panels in the First, Second, Third, Fifth, Ninth, Tenth, and District of Columbia Circuits define a motivating or substantial factor as a factor that made a difference in the employer's decision. *Brown v. Board of Trustees of Boston University*, 891 F.2d 337, 352 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 82 (2d Cir. 1983); *Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980);[11] *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1240 (5th Cir. 1981); *Mitchell v. Keith*, 752 F.2d 385, 391 (9th Cir.), *cert. denied, sub nom. GM v. Mitchell*, 472 U.S. 1028 (1985); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1170 (10th Cir.), *cert. denied*, 474 U.S. 496 (1985); *Krodel v. Young*, 748 F.2d 701, 706 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985).

The confusion appears to arise from combining the basic Title VII causation standard with the affirmative defense of intervening and independent causation.[12] ***There***

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[11] The entire Third Circuit has adopted the "made a difference in the decision" approach to the causation standard. *Chippollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.)(*en banc*), *cert. dism.*, 483 U.S. 1052 (1987).

[12] Candidly, this Court has made its own contribution to the confusion. In *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 709 (1989), the Court phrased the causation question as whether the "recommendation that petitioner be relieved of his coaching duties was motivated in substantial part by petitioner's protected statements to the press." *Price Waterhouse v. Hopkins*, *supra*, also contained problematic descriptions -- "her burden was to show that the unlawful motive was a substantial factor in the adverse employment action," 490 U.S. at 259 (White, J., concurring); "an illegitimate factor played a substantial role in the decision," 490 U.S. at 267 (O'Connor, J., concurring). Rather than reconcile the plurality and concurrences by defining the adjective "substantial" to mean that the factor made a difference in the decision, a conflict over a hybrid

is, however, no degree of illicit motivation which may influence the decision to fire an employee. A hybrid causation standard wrongly requires employees and applicants to accept some discriminatory or retaliatory animus.

Under Title VII, racism need not be a substantial motivating factor; proof of ***any*** racist motivation, whatever the degree, satisfies the plaintiff's burden. To borrow from the federal appellate circuits with the clearest explanation, if racism made a difference in the employer's decision, then Title VII has been violated. After all, "it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S at 801. As the Court explained in *Village of Arlington Hgts. v. Metro. Housing Dev. Corp.*, *supra*, 429 U.S. at 266, "racial discrimination is not just another competing consideration."

The theory underlying the same-decision defense is that race really made no difference in the employer's decision. By recognizing the same-decision defense, this Court and Congress have not countenanced an employer's use of race as a ***motivating*** factor in any degree. Instead, the same-decision defense depends on the fact that the employee would have been fired without regard to race. Consequently, the employer is treated as if race were not a motivating factor at all.

The proper causation standard -- whether discrimination was a but-for cause in the sense that it made a difference in the employer's decision -- can be readily reconciled with the same-decision defense. The burden is not to prove a substantial motivating factor or motivation in substantial part; rather, the burden is to prove simply that discrimination made a difference in the employer's decision. Once the Title VII plaintiff has satisfied that

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causation standard has evolved. *See, Palmer v. Baker*, 905 F.2d 1544, 1548 n. 8 (D.C. Cir. 1990)(contrasting plurality and concurrences).

burden, the employer may accept the persuasion burden on the affirmative defense and prove that discrimination made no difference because the same decision would have been reached even without the discrimination.

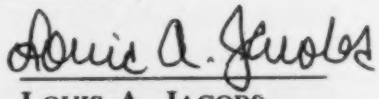
One Title VII causation standard must apply nationwide. Uniformity is obviously necessary, and this confusion must not be permitted to persist.

CONCLUSION

This Petition involves a Title VII action alleging a racially discriminatory discharge. Whether the causation standard of a "motivating" or "substantial" factor may be replaced by the hybrid standard -- "substantially motivated" -- is a concern, however, in all constitutional and statutory claims of discrimination or retaliation. Taking this opportunity to answer that question would thus have broad impact, guide bench and, especially, jury trials by removing a troublesome issue, and clarify a core element of these claims.

For these and the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Sixth Circuit to review the question presented by this Petition.

Respectfully submitted,



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Filed Apr. 8, 1994

No. 93-3160

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RHONDA J. PARRISH,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
RIVERVIEW NURSING HOME, INC.; JOSEPH PINO,	)	
	)	
	)	
Defendants-Appellees.	)	

BEFORE: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s

Leonard Green, Clerk

Filed March 7, 1994

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 64 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Case No: 93-3160

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

RHONDA J. PARRISH

Plaintiff - Appellant

v.

RIVERVIEW NURSING HOME, INC.; JOSEPH PINO

Defendants - Appellees

BEFORE: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

/s

Leonard Green, Clerk

A-3

No. 93-3160

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RHONDA J. PARRISH,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	OPINION[13]
	)	
RIVERVIEW NURSING HOME, INC.; JOSEPH PINO,	)	
	)	
	)	
Defendants-Appellees.	)	

BEFORE: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges

Merritt, Chief Judge: "Counsel, as we did in the last case, we are going to decide this case from the bench, and Judge Siler will for the record provide the court's reasoning in the matter."

Siler, Circuit Judge: "We are impressed by counsel's argument. He is very articulate, but in fact, the issue as far as we can see is whether these findings that have been made by the magistrate judge and adopted by the district court would be clearly erroneous or whether they err on the issue of law, and we find there is no error here and for the reasons stated by the magistrate judge and adopted by the district court, the court finds no discrimination here in

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[13] Issued from the bench at oral argument on March 4, 1994, and transcribed from tape-recording supplied by the Office of the Clerk of the Sixth Circuit.

her employment situation, and we do adopt the statement by the magistrate judge that Miss Parrish failed to prove that discrimination on the basis of her race played a substantial part in the decision to terminate her employment, and even though the magistrate judge may not have found every specific fact that counsel would have wanted the magistrate judge to do, nevertheless there are sufficient findings upon which this decision has been made and the decision is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Rhonda Parrish,

Plaintiff,

v.

Riverview Nursing Home, Inc., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number C2-90-765

Judge Beckwith
Magistrate Judge Kemp

/_/ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

/x/ **Decision by Court.** This action came to trial or hearing before the Court. This issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Report of the Magistrate Judge is hereby ADOPTED, DISMISSING the complaint with prejudice. Judgment is entered in favor of the Defendant, Riverview Nursing Home.[14]

December 31, 1992
Date

KENNETH J. MURPHY
Clerk

/s
(By) Deputy Clerk, Michael Carey

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[14] The parties have treated this Judgment as if also entered in favor of the individual defendant, Joseph C. Pino.

Filed Dec. 29, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rhonda Parrish,	)
	) Case No. C2-90-765
Plaintiff,	)
	)
vs.	)
	)
Riverview Nursing Home,	)
Inc., et al.,	)
	)
Defendants.	)

ORDER

This matter is currently before the Court for review of the Master's Report of Magistrate Judge Terry Kemp entered on September 23, 1992. Magistrate Judge Kemp held an evidentiary hearing in this matter on July 13, 14, and 15, 1992, pursuant to 42 U.S.C. §2000e-5(f)(5). In his Report, the Magistrate Judge made various findings of fact and conclusions of law regarding the issue of whether the Plaintiff's discharge violated her rights under Title VII.

On November 9, 1992, the Plaintiff filed several objections to the Report, and on December 8, 1992, the Defendants filed a memorandum in opposition to the Report. The Plaintiff was previously employed by the Defendants as charge nurse. The Defendants terminated the Plaintiff from that position on March 8, 1989. The Plaintiff is black and she contends that her dismissal was motivated by racial animus on the part of the Defendants.

The Court has carefully reviewed the Plaintiff's objections, the Defendants' memorandum in opposition, the Magistrate Judge's Report, and the transcript of the hearing conducted by the Magistrate Judge on July 13, 14, and 15th. The Court finds the Plaintiff's objections to be without merit, and **DENIES** the Plaintiff's objections. The Court hereby **ADOPTS** the Magistrate Judge's extremely well-reasoned Report.

IT IS SO ORDERED.

/s

Sandra S. Beckwith
United States District Judge

Filed Sep. 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Rhonda Parrish,	:	
Plaintiff,	:	
	:	
v.	:	Case No. C2-90-765
	:	
Riverview Nursing Homes,	:	JUDGE BECKWITH
	:	
Defendant.	:	

MASTER'S REPORT

I. INTRODUCTION

This is an employment discrimination case which was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. Plaintiff, Rhonda Parrish, was formerly employed as a "charge nurse" by defendant, Riverview Nursing Home. She was dismissed from that position on March 8, 1989, and contends that her dismissal was motivated by racial animus.

After exhausting appropriate administrative remedies, Parrish filed this case. It was referred to me for the holding of an evidentiary hearing and the issuance of a Master's Report pursuant to 42 U.S.C. §2000e- 5(f)(5). The following constitutes my findings of fact, discussion and conclusions of law on the issue of whether Parrish's discharge violated her rights under Title VII.

II. FINDINGS OF FACT

The following facts, set forth in narrative form, are those which I find to have been proven by a preponderance of the evidence at the hearing which was held on July 13, 14, and 15, 1992.

Rhonda Parrish, the plaintiff is black. She is a licensed practical nurse, received her degree in nursing from Jefferson Technical Institute, and became licensed by the State of Ohio in 1985. Her first job as a licensed practical nurse was with the Carriage Inn in Steubenville, Ohio, which is a nursing home. She was responsible for direct patient care and also supervised nurse's aides. She left that job in October, 1987.

Shortly thereafter, Parrish responded to an advertisement for an opening at Riverview Nursing Home, which was also a facility which cares for elderly patients. She was the only person who answered the ad. She was hired on the day of her interview, November 14, 1987, and started work the next day. She worked in the capacity of a "charge nurse," which denotes the nurse in charge of the floor at the nursing home, until March 8, 1989, the day she was fired. She was the only black charge nurse at Riverview during that entire time period. Her duties consisted of "taking report" from the charge nurse who was going off duty, taking inventory of any narcotic drugs which had been prescribed for patients, dispensing medication, helping to feed patients, completing rounds, taking temperatures and other vital signs, and keeping charts recording her activities.

For approximately the first year she worked at Riverview Nursing Home, Parrish's immediate supervisor was Annette Guild, whose title was Director of Nursing. Ms. Guild's supervisor, and Parrish's indirect supervisor, was Joseph Pino, the Administrator of the facility. Ms. Guild was a registered nurse. The office of the Director of

Nursing and the facility administrator was located next to the nursing home, but was not physically connected to it.

Parrish received her first evaluation in February, 1988, three months after she began work. That evaluation appears in the record as Exhibit P-17. She received an overall score of B+ for that evaluation, scoring as low as "C," or satisfactory, in only two areas: ability to function well in crisis and acceptance of work plan. Guild recommended her continued employment.

Parrish was evaluated again in May, 1988. Her overall rating for that evaluation was a B-/C+. She received C's in five areas, and a rating of "?" in the category of "Accepts Responsibility." Guild recommended her continued employment, but also expressed some concern by way of a handwritten note on the evaluation form indicating that "very recently" (in the May, 1988 timeframe) she had received complaints about Parrish's work, and also from her own experience was beginning to question her responsibility as a charge person.

Shortly after that evaluation, Guild met with Parrish and Pino. The fifteen pages of notes recording the discussions at that meeting are in the record as defendant's Exhibit D-1. According to those notes, as confirmed by Guild's testimony by videotape deposition, she believed that Parrish had a problem with her credibility as a supervisor and her demeanor while working on the floor. In particular her development of close and friendly relationships with the nurse's aides whom she was required to supervise, and her loud and boisterous behavior with staff and residents, concerned the administrators. Guild had several additional occasions to express her concern about Parrish's behavior, including her ability to supervise nurse's aides and her dispensing of medication in a timely fashion. She did not express these matters on any subsequent evaluation of Parrish because she resigned as Director of Nursing prior to the time that Parrish's one-year

evaluation was to be completed. She did, however, express in writing when resigning her position that she was concerned about Parrish's continued employment as a charge nurse and that she questioned Parrish's professionalism, honesty, and work ethic.

Guild was replaced as Director of Nursing by Jaye Bennett White, an LPN who had previously been employed as a floor nurse in much the same capacity as Parrish. White was responsible for completing Parrish's evaluation on November 10, 1988. She gave Parrish an overall rating of "C," gave her that rating in six categories, and rated her as a "C-" in a seventh. In the section of the form where her recommendation for continued employment was to be made, White made the notation "yes/?" She stated on the evaluation form that she believed Parrish's general attitude to be inconsistent and bordering on insubordinate, and believed that Parrish did not take to heart for any length of time corrections where were suggested to her. She also did not believe that Parrish appropriately recognized situations where she should ask for guidance, but took such matters into her own hands.

Shortly before that evaluation, and for the first time since Parrish was employed at Riverview, narcotics were prescribed for a Riverview patient. Patient Mary Jacob was given a prescription for Tylox beginning on October 25, 1988. Approximately a month after that, on November 20, 1988, patient Elizabeth Walls was given a prescription for Demerol. Because Parrish was ultimately given, as the reason for her discharge, failure to comply with the nursing homes's policy concerning the documentation of her inventory of narcotics, some detail with respect to the narcotic drug policy and procedure is necessary.

Because of federal and state regulations pertaining to the administration of narcotic drugs, such substances are required to be kept in a locked cabinet separate from other medications, and a written record showing the dispensing

of and inventory levels of such drugs is required to be kept. Such procedures are typically learned by licensed practical nurses during their education and training, and the importance of maintaining an accurate record of narcotic drugs was known to all of the charge nurses at Riverview prior to such drugs being introduced into the facility in October of 1988. In order to insure that the procedures were carried out, Riverview developed a narcotic record sheet which required a physical count to be taken of narcotic drugs once every eight hours. The sheet also had a column to indicate the amount of narcotics dispensed during any particular eight hour shift, so that a running inventory could be kept. Examples of those narcotics records are part of the record as plaintiff's Exhibits P-33 and P-34.

In October, 1988, Riverview's policy, expressed in writing (see Exhibit P-32), was that the nurse going off duty and nurse coming on duty would jointly be responsible for the narcotics count. Apparently due to this division of responsibility, Riverview experienced problems with its nurses forgetting to do the count and to complete the sheet. This failing was common to all charge nurses for approximately one month after narcotics were introduced in October, 1988.

In order to remedy this problem, and to place responsibility for doing the narcotics count on one person, Riverview changed its policy to require that the nurse coming on duty count the narcotics immediately after receiving report from the off-going nurse, but while that nurse was still in the facility. The purpose of having the count performed while the off-going nurse was still in the facility was to enable the counting nurse to note any discrepancies between the amount of narcotics actually counted, and the amount that should have been there, and to try to resolve those discrepancies with the off-going nurse. There was a conflict in the testimony concerning

whether the change to this policy was ever posted in writing. It is unnecessary to resolve this conflict because Parrish clearly testified that she was aware that the nursing home's policy required the oncoming nurse to count the narcotics, and to do so at the beginning of her shift.

In early December, 1988, it came to the attention of Riverview's administrators that Parrish had been involved in making an incorrect entry on one of the narcotics sheets. One of the other nurses, Donita Rine, told White that she and Parrish had placed an incorrect entry on the sheet reflecting that one-half cc of Demerol had been dropped when, in fact, the entry was made to make the records match the amount of Demerol which appeared to be left in the bottle. It subsequently turned out that the scale on the side of the bottle was inaccurate, and that no discrepancy actually existed. However, Rine and Parrish did not know that at the time, and Rine suggested to Parrish that they make the false entry. As a result of this information being revealed by Rine, Pino talked to Parrish in White's presence and gave her a verbal warning for this conduct. He also talked to Rine about the matter, but did not give her a verbal warning. Rather, he issued what was, in his words, a "verbal correction," meaning that he told her that she had done something in error and that she was not to do it again. The Riverview Disciplinary Procedures, described in Exhibit P-15, describe the first step in the disciplinary process as a "verbal warning." The phrase "verbal correction" does not appear in the Disciplinary Procedures. Donita Rine is white.

During their discussion about the falsified entry, Pino also discussed the issue of timely completion of the narcotics sheet with Parrish. It is undisputed that the words he used to emphasize to her the necessity to complete this sheet at the beginning of her shift were that she could complete it "as soon as she took her coat off." Parrish, as well as other nurses, often arrived at the facility

ten or more minutes before her shift began. It would have been improper for her to count narcotics until the off-going nurse had completed her shift. Consequently, Parrish believed that she could not comply literally with Pino's directive, but she believed that a different rule had been established for her than for the other nurses, who were, as noted above, required to count the narcotics after receiving report and before beginning their floor duties. Pino testified that he meant the comment as a reminder to Parrish that, once she had her coat off, which she typically hung near the narcotics cabinet, she should proceed to do the count. As discussed further below, whether or not Pino's comments amounted to a "rule" established only for Parrish, she was not discharged for violation of this "rule." Therefore, the manner in which Pino intended his comments to be interpreted is relevant only to the question of whether his comments constituted circumstantial evidence that he discriminated against Parrish by treating her differently from other nurses. It is not disputed that he did not use similar language to remind any other charge nurse of her obligation to perform the narcotics count at the beginning of her shift.

In late January, 1989, White told Pino that she was continuing to experience problems with Parrish's timely completion of the narcotics sheet. According to White, when she worked a shift as a floor nurse on January 21, 1989, she noticed that Parrish had failed to sign the narcotics sheet on January 19, 1989 and January 20, 1989. Since, on each date, each nurse is required to sign twice, once at the beginning of the shift and once at the end of the shift, White believed that four signatures were missing from this sheet. Since Parrish was not scheduled to work again until January 24, 1989, White testified that she left Parrish a note reminding her to fill in the missing signatures. Parrish testified that she does not recall not signing the sheet, and does not recall receiving such a note. No

other nurse whose signature appears on this particular sheet, which is part of Exhibit P-34, recalled Parrish's or anyone else's signature being missing from this sheet, and all of those nurses who testified stated that if they noticed a missing signature, they would remind the off-going nurse to sign the sheet before she left the facility.

After this incident, White began to "spot-check" the narcotics sheet to determine whether Parrish was signing it in a timely fashion. Noticing that Parrish failed to sign the sheet in a timely fashion on at least one occasion after January 24, 1989, she advised Pino of that fact and the two of them met with Parrish on January 31, 1989. At the meeting, Parrish was told that a written warning would be issued for her continual failure to comply with the facility's narcotics recordkeeping policies. At the conclusion of the meeting, Parrish asked if she could meet with White and Pino the following day to discuss the matter further. They agreed and such a meeting was scheduled.

In the February 1, 1989 meeting, Parrish expressed her concerns that she was being treated differently from other nurses. In particular, she suggested that the other nurses were not required to complete the narcotics sheet immediately at the beginning of their shift, as she was required to do. She did not name any specific nurses, but did state that one nurse, Martha Duff, always did it timely. At that time, there were only four other charge nurses performing that duty. Neither White nor Pino asked Parrish for any further details on this charge, and Pino stated to her that other nurses were not his concern at the meeting, but her performance was. Parrish also raised some concerns about her interaction with Kathy Bradley, one of the charge nurses, who is also White's sister. Pino and White did subsequently meet with Bradley to discuss these concerns, but they took no specific action to determine whether Parrish's claim that other nurses were not completing the narcotics count sheet in a timely fashion

was accurate. White did not spot-check the other nurses except for observing their behavior when she filled in for a charge nurse. The only nurse whose shift typically began during White's normal working hours, however, was Parrish.

Although Parrish was promised a written reprimand, which is step 2 of the Riverview Disciplinary Policy, after the January 31, 1989 meeting, one was never issued. She was also not told that she would be fired if she ever again failed to complete the narcotics sheet.

White testified that on "numerous occasions" during the month of February, 1989, Parrish again failed to complete the narcotics sheet on time. Unlike previous instances where White documented such failures, however, there is nothing in the file indicating that she recorded any of these instances. In light of her previous documentation of such matters, and in light of the fact that Parrish had been issued two warnings about this matter, it appears unlikely that White would have let a significant number of these instances pass by without documentation. Consequently, I conclude that there is no credible evidence that Parrish failed to complete the narcotics sheet in a timely manner during February, 1989.

On March 3, 1989, Martha Duff, who worked the shift immediately before Parrish on that day, observed Parrish completing the narcotics count sheet without unlocking the cabinet and physically counting the narcotics. Duff was concerned about this matter but decided to observe Parrish the following Monday, March 6, 1989, to determine whether Parrish would repeat this procedure. Duff observed the same behavior on March 6, and reported it to White and Pino during the morning of March 8, 1989. They requested her to observe Parrish that afternoon to see whether she completed the sheet without physically counting the narcotics.

Parrish reported to work on March 8, 1989 sometime before 3:00 p.m. Although Duff testified that she did not believe Parrish was ill that day, the testimony of Parrish, White, and one of Parrish's co-workers, nurse's aid, Mary Lou Gray, confirms the fact that Parrish was ill. Parrish did take report from Duff but, by 3:30 p.m., had not done the narcotics count. On her way out, Duff stopped by the administration building and reported Parrish's failure to do the count to White.

Meanwhile, back at the facility, Parrish continued to struggle with flu-like symptoms, including vomiting and diarrhea. One of her patients was a diabetic and required an insulin injection before mealtime, which was scheduled for 4:00 p.m. Parrish administered that injection between trips to the bathroom, and also prepared her 4:00 o'clock medications to be distributed. At some point, however, she was required to lie down on the couch, and believed she was sufficiently ill that she might be having a heart attack. White was summoned to the facility to take Parrish's pulse and blood pressure. She did that at approximately 4:10 p.m., and, on her way back to the administrator's office, checked to see if Parrish had completed the narcotics count sheet. She had not.

Pino was not in his office when White went to the facility to check on Parrish. He returned sometime before 5:00 p.m., and White reported to him that Parrish had not completed the narcotics count sheet by 4:15 that afternoon. Pino immediately determined that Parrish should be fired, and he and White went to the facility, called Parrish aside, and fired her. It is not disputed that, by the time she was fired, Parrish had completed the narcotics sheet. Later that evening, Parrish went to the hospital.

Because she was so surprised that Pino was discharging her, Parrish requested that Pino repeat several times the reason for firing her. He did so, each time indicating that it was for failure to complete the narcotic

sheet at the beginning of her shift. No mention was made during that meeting of any cumulative effect of the past unfavorable evaluations she had received, or other instances of "unprofessional" conduct or failing to document or record treatment or medications, other than the failure to complete the count sheet at the beginning of her shift.

Two days after Parrish was fired, Lynn Lash, a white nurse, was hired to replace her. Lash had been working at another nursing home in Steubenville, and had contacted Riverview in February to see if any job openings existed there. Contrary to Riverview's normal practice, Lash was given an interview with Pino and White even though there were no immediate openings. Pino and White testified that Lash was offered a part-time position, although it is unclear exactly what part-time opening existed. Such a position had neither been advertised nor offered to anyone else. On her employment application, Lash stated that she was available for full-time work on March 10, 1989, which was the day she was hired. She had given two-weeks' notice to her previous employer in February. After Lash was hired to replace Parrish, Riverview did not advertise any part-time positions nor was anyone hired in that capacity.

The above constitutes, for the most part, the historical facts underlying this dispute. The outcome of this case, however, depends upon what inferences the Court draws from those facts, a matter which will be discussed in more detail below. There are also some additional facts required to evaluate Riverview's claim that this action was settled during proceedings before the Ohio Civil Rights Commission, and that Parrish is collaterally estopped from contesting the validity of her discharge based upon her unsuccessful attempt to obtain unemployment compensation. These matters will each be dealt with in a separate section of this Report.

III. DISCUSSION

A.

Although the correct resolution of this case turns largely upon the Court's view of the facts, it is also important to consider those facts in view of the applicable legal standard. In this case, the legal standard relating to Parrish's claim that she was discharged in violation of Title VII is fully set forth on pages three through six of the Master's Report and Order which was filed on March 5, 1992. The Court will apply those same principles to the facts as they more fully appear from the record of the Master's hearing.

It requires little discussion to determine that Parrish had made a prima facie case under Title VII. She is a member of a protected group; she was, at all times, qualified for the position of charge nurse; she was adversely affected by a job action; and she was replaced by a non-minority. Nothing more is required to establish a prima facie case.

Just as Parrish met her burden of establish a prima facie case, Riverview also met its burden of articulating a specific and non-discriminatory reason for her discharge. That reason consisted of her failure timely to sign the narcotics count sheet on March 8, 1989. Riverview has also articulate reasons which, if accepted by the court, would explain why even a brief delay in signing the sheet on that date, and notwithstanding the fact that Parrish was ill when she reported to work, was the actual reason for Parrish's discharge rather than any intent to discriminate against her based on her race. At the initial stage of the case, however, Riverview's only burden was to articulate a specific reason for discharge, and it clearly did so.

In accordance with the legal principles applicable to this case, once each party has met its legal burden, any

presumptions created by those burden-allocating rules simply drop out of the case, and it becomes the plaintiff's obligation to prove, by a preponderance of that evidence, that her discharge was substantially motivated by racially discriminatory reasons. Although I view this as an extremely close case, I do not believe that, when all the evidence is considered and weighed, that Parrish has met that burden.

In explaining why I am of the view that Parrish did not demonstrate the discrimination was, more likely than not, either the sole reason or a substantial factor in her discharge, it may be helpful to set out the theory which, most persuasively, explains her discrimination claim. This theory was articulated by counsel at the closing argument, and its persuasiveness certainly entitles Parrish to a detailed explanation of why the Court has ultimately concluded that it is not the most plausible view of the facts.

As Parrish sees it, she was initially hired by Riverview because there was a shortage of qualified nurses in the Steubenville area. Riverview desperately needed someone with her qualifications, and she was the only person to answer its ad. Riverview had had only one other black nurse in its entire history of operations, and that person was not working there when Parrish was hired. Thus, even from the beginning, Riverview (acting, of course, primarily through its Administrator, Joseph Pino) chose to hire a black nurse out of necessity rather than out of any even-handed employment policy.

It was apparent almost from the outset that Parrish did not "fit in" with the remainder of the professional staff at Riverview. Parrish is not, by nature, a quite person. She had a strong desire to make the residents' stay at Riverview -- usually their last days, months, or years of life -- as pleasant as possible, and she talked, sang, and danced with them. She exhibited the same overtly friendly behavior toward her nurse's aides and her supervisors.

Some of this behavior, she believes, was resented by Riverview Administration because it is culturally distinct from the behavior engaged in by the white nurses, and could also have been viewed as "uppity," as, for example, when she patted a pregnant Annette Guild on the stomach and asked about her baby.

As a result of these cultural differences and not "knowing her place," Parrish was viewed with a more critical eye than the rest of the nursing staff. This explains, at least in large part, the criticisms leveled at her by Annette Guild both during the June, 1988 meeting and in Guild's parting memo. It would also explain why Parrish was the only one criticized for certain behavior which involved another employee as well --for example, when a nurse's aide was supposedly visiting with Parrish at the nursing home when the aide was not on duty, or the incident where Martha Duff supposedly misplaced a catheter in an elderly patient. In the latter instance, Parrish was criticized for suggesting that the patient derived some sexual pleasure from the placement of the catheter, but Duff apparently was not criticized for having misplaced it in the first instance.

According to Parrish's view of the facts, this situation simply continued after Guild left. When White became the Director of Nursing, being elevated from the position of another charge nurse whose responsibilities were the same as Parrish's, Parrish treated her as a "best buddy" rather than as a supervisor. White, too, believed that Parrish showed a lack of respect for authority, a feeling she did not have about the white nurses. She also began to evaluate Parrish more critically, spot-checking her completion of the narcotics count sheet without doing the same for other nurses, and reporting incidents to Pino which led to the issuance of a verbal and then a threatened written warning.

Additionally, White, as a supervisor of nursing, did not take any steps to insure that Donita Rine, who was equally as guilty as Parrish with respect to the falsification of the narcotics count sheet, received similar discipline. Pino, of course, was also involved in the differential treatment, expressing to Parrish the need for her to do the narcotics count "as soon as she took her coat off," language that was not used with any of the white nurses even though there had been initial problems in having the count sheet done in a timely fashion. Pino was the one who chose not to discipline Donita Rine, and he also ignored Parrish's statements, during their February 1, 1989, meeting, to the effect that other nurses were continuing not to complete the count sheet immediately after reporting to work. His failure to investigate those charges, and to continue to insist that Parrish adhere to the rule or face further discipline, is evidence of his differential treatment of her.

Finally, Parrish contends, matters came to a head when Lynn Lash, a white nurse, applied for a job in February. Parrish claims the circumstances of Lash's hiring indicate that, by mid-February, Pino had made up his mind to replace her at this first opportunity. He interviewed Lash when there was no job opening, contrary to his usual practice, and he hired her on the day that she indicated she was available for full-time work, creating that opening by firing Parrish two days before. The events of March 8, 1989 were simply a manufactured excuse to fire Parrish, now that a white nurse was available to replace her. All of those matters, taken together, constitute a continued pattern of discriminatory treatment, followed by a firing, which would not have occurred had Parrish been white.

Much of the factual basis for Parrish's contentions is not in dispute. Parrish was treated differently from the other employees in certain respects. It appears that her

work was monitored more closely by Guild and White. Pino made his point concerning signing the narcotics count sheet more strenuously to Parrish than to anyone else. There was a difference in the discipline meted out to Parrish and Donita Rine when both were equally responsible for falsifying the sheet. The record does not reflect any serious attempt to investigate Parrish's claims that other nurses were not filling out the narcotics count sheet in a timely fashion. Rather, White continued to do what was convenient for her, which was to check the other nurses at the beginning or end of a shift which she worked personally, and to spot-check Parrish during the times when she worked her usual hours as an administrator. Differential treatment can certainly create an inference of racial discrimination. The question on this record, however, is whether there are other reasons evident for this differential treatment which either equally likely, or more likely, explain Riverview's behavior. I believe that there are.

After having considered Guild's and Parrish's testimony concerning the incidents in which the two of them were involved, I am persuaded that Guild criticized Parrish not out of racial animus but because she was truly concerned that Parrish's behavior was unprofessional in a number of ways. Parrish did appear, during Guild's tenure, to take a relatively lax attitude toward proper completion of paperwork. There were multiple instances where she failed to record information on a patient's chart in a proper fashion, and instances where her entries on the medication sheet were not done properly. She did not appear to consider these failings as particularly important, and Guild developed an honestly-held belief that Parrish was unable to accept professional criticism and conform her conduct to professional norms. The record does not support the conclusion that Guild would have treated a white nurse with the same failings any differently, and, as a result, the negative impression of Parrish reflected on

Guild's evaluation, which was communicated to Pino, formed a legitimate and non-discriminatory basis for Riverview's concern about Parrish's continued employment, and for closer scrutiny of her performance by White and Pino.

It is undisputed that Parrish, like other nurses, had a problem in timely completing the narcotics count sheet when narcotics were reintroduced into Riverview in the fall of 1988. Pino had an opportunity to talk to Parrish about this, however, when the matter of the "dropped syringe" came to his attention. By that time, he legitimately believed that Parrish needed more direction in this area than did the other nurses, and although his precise instructions to her may have been unwarranted, she clearly understood Riverview's expectations that she complete the count sheet soon after she reported to work, and in any event before she began her floor duties. Both she and Pino correctly regarded this as an important matter. It should be noted that the only two documented instances after this date where a white nurse failed to fill out the sheet at the beginning of a shift were explainable by unique circumstances -- one, by a suicidal patient who needed immediate attention, and the other by the off-going nurse having left with the key to the narcotics cabinet.

The strongest evidence that Parrish did not carry out this directive is White's statement that, on two occasions in January, Parrish did not fill out the sheet at all. Frankly, I have difficulty concluding that White's version of this incident is accurate, given the testimony of all the other charge nurses that they likely would have reminded Parrish to fill in a blank signature line at some point in time, and that none of them recalled any of these blanks being on a sheet. Even disregarding that incident, however (which, in order to rise to the level of evidence of discriminatory intent, would have to have been instigated by Pino, since he ultimately fired Parrish), there is reliable evidence that

she failed to fill out the count sheet in a timely fashion on other occasions in January. Consequently, the January 21, 1989 and February 1, 1989, counseling sessions were based upon misconduct and, in my view, would have been held with other nurses had their misconduct been as serious as Parrish's.

It is somewhat troubling that neither Pino nor White appeared to investigate Parrish's claims that other nurses were as dilatory as she in filing [sic] the count sheet out. It is also significant, however, that Pino disciplined Kathy Bradley, a white nurse, for conduct involving her and Parrish directly as a result of listening to Parrish's concerns about other nurses in the February 1, 1989 meeting. It is also reasonable to infer that White believed, through her own system of checking on the other nurses, that no other nurse had a problem with the narcotics count sheet besides Parrish. Thus, there is an equally likely explanation for the failure to do more in this area -- that the supervisor of nursing believed that she had independent personal knowledge of the facts, and that Parrish was simply incorrect.

I also believe that both Pino and White were, in fact, advised by Martha Duff in March, 1989 that Parrish was signing the sheet without doing a physical count. Whether Parrish did so is not important; what is important to this case is whether Pino believed that she did so, based upon a report which he received from Duff. I am persuaded that Duff made the report that she did, and that Pino had that incident clearly in mind when White advised him on March 8, 1989 that Parrish had not timely completed the narcotics count sheet on that date.

Further, I am persuaded that, as between the two versions of what occurred that afternoon, White's is the more believable. Parrish was ill when she reported to work; she was concerned about getting her insulin-dependent patient her injection before dinner; and she admitted that, by the time White came to the nursing home to check

on her, she had already poured her 4:00 o'clock medications. Given the way in which she described the course of her illness that afternoon, it is extremely unlikely that she would have been able to make repeated trips to the bathroom, give the insulin shot, pour her medications, complete her medication records, and do the narcotics count and complete the sheet within an hour and ten minutes. Thus, I am persuaded that White observed, and reported to Pino, the absence of a signature on the count sheet at approximately 4:15 that afternoon. Given Riverview's history with Parrish, Pino then made the decision that afternoon to discharge her, not because she was black, but because her failure to sign the count sheet that afternoon was simply the last straw. Undoubtedly, it could be inferred that he would not have made the same decision had Parrish been white, but I do not believe that Parrish has met her burden of proving by a preponderance of the evidence that Pino was motivated in substantial part by Parrish's race when he chose to discharge her on March 8, 1989. That being the case, her claim of discrimination under Title VII must fail.

B.

Riverview has raised two affirmative defenses to Parrish's claim, accord and satisfaction and collateral estoppel. Because I have concluded that Parrish's claim fails on its merits, it is technically unnecessary to address either of these matters. However, because of the possibility that the Court will disagree with my conclusions on the merits, I choose to address each briefly.

With respect to the accord and satisfaction defense, Riverview claims that its President, Dominic Bianco, entered into an agreement with Romy Saunders, an employee of the Ohio Civil Rights Commission, to settle this case for $2,500 without reinstatement. Riverview does not

advance any legal arguments in support of its contention that this constituted a binding resolution of this case, but asks the Court to make factual findings on this matter in order to preserve it for appellate review if necessary.

Mr. Bianco testified that he is a 90 percent owner of Riverview Nursing Home as well as the president of the corporation, and that he has been a practicing attorney since 1942. He acted as the attorney for Riverview during the unemployment compensation case and also during proceedings before the OCRC. During those proceedings, he never dealt directly with Parrish, but rather dealt with Saunders.

Bianco testified that on February 7, 1990, Saunders communicated an offer to settle the case for a payment of $5,000 and reinstatement. Bianco called back and offered $2,500 without reinstatement. He stated that Saunders said that was acceptable, and that he would prepare the settlement agreement. After waiting for approximately a month without receiving such an agreement, Bianco talked to Saunders again. Saunders said at that point that Parrish had turned down the offer and was demanding $10,000 without reinstatement. There were no more discussions of settlement after that conversation.

I cannot find, from this testimony, that Saunders represented to Bianco that he had authority to bind Parrish to a settlement agreement. Rather, it appears that Bianco was aware, when he called Saunders back with an offer of $2,500 without reinstatement, that Saunders did not, before saying this was "acceptable," consult with Parrish. Saunders was not acting in a capacity as Parrish's attorney, and Bianco, from his business and legal experience, knew that. Moreover, there is no evidence that Parrish authorized Saunders to act as her agent in negotiating a settlement, or to accept any particular figure. Of course, legally Saunders could not have acted under the cloak of apparent authority unless Parrish had taken some action which led

Bianco to believe that Saunders was her agent. Bianco never talked to Parrish directly during the OCRC proceedings. Under all of these circumstances, Riverview has not met its burden of proof on this affirmative defense, even as to the "fact" that Saunders assented to Bianco's settlement proposal.

With respect to the collateral estoppel defense, the facts are fairly straightforward. Parrish did file a claim for unemployment compensation, and the entire record of those proceedings is an exhibit in this case. Bianco testified that he was aware both that Parrish appealed the case to the Jefferson County Common Pleas Court and the case was dismissed by the court, although no record of those proceedings was introduced nor was the reason for dismissal stated in the record. Given the fact that Parrish failed to prove, in that proceeding, that her termination from employment was without just cause, Riverview argues that she is collaterally estopped in this proceeding from asserting that racial discrimination played a substantial role in her termination.

Federal courts are bound to accord state agency factual determinations the same preclusive effect that the courts of that state would given them. University of Tenn. v. Elliott, 478 U.S. 788 (1986). Today, by a 1989 statutory amendment enacted shortly after the OBES made its determination in Parrish's case, OBES findings are to be given no collateral estoppel or res judicata effect in subsequent judicial proceedings. Ohio Rev. Code Ann. §4141.28(5) (Anderson 1991). Ohio courts were, prior to the change in the law, applying preclusion to certain OBES findings. Noyes v. Channel Products, Inc., 935 F.2d 806 (6th Cir. 1991). It is unnecessary to decide if the amendment should apply to the instant case because the Court has concluded that an Ohio state court would not accord preclusive effect to the OBES's factual determinations concerning Parrish's discharge.

The Ohio Supreme Court has stated: "[A]n absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." (Citations omitted). Goodson v. McDonough Power Equipment, Inc., 2 Ohio St. 3d 193, 201 (1983). (Emphasis added).

In Cooper v. City of North Olmsted, 795 F.2d 1265 (6th Cir. 1986), the court declined to give preclusive effect to an OBES decision in a subsequent Title VII action as the race or sex discrimination issues were "not actually or directly presented to or ruled on by the OBES." Id. at 1268-69. The Cooper court noted that the defendant had the burden, under Ohio preclusion law, not only of proving that the discrimination claims were "actually and directly at issue" in the state proceeding but "that they were essential to the judgment" against the plaintiff. Id. at 1268. Because the court in Cooper found that the Title VII claims were not at issue in the prior proceedings, the court did not have to address whether the issues were essential to the judgment.

Riverview, attempting to distinguish Cooper, contends that the issue of racial bias in this case was actually litigated before the OBES, and the OBES determined that there was no racial discrimination in Parrish's discharge. This contention is supported by the statement by the Unemployment Compensation Board of Review, in its "Findings of Fact," that there had been no discrimination against Parrish by her employer. However, Riverview had made no showing that OBES's finding on the racial discrimination claim was "essential to the judgment" of OBES that Parrish was not entitled to unemployment compensation benefits.

OBES is charged, under Ohio law, with determining if there was "just cause" for an employee's discharge, thus precluding the issuance of unemployment benefits. Ohio Rev. Code Ann §4141.29(D)(2)(a) (Anderson 1991). OBES found just cause for Parrish's dismissal from employment. A determination of just cause "focused on the existence of fault on the part of the employee as a factor in the discharge." Cooper, 795 F.2d at 1268. A finding of just cause, or employee misconduct, therefore, is what is "essential" to an OBES decision denying an applicant's benefits. An employer may be found to have had just cause by the OBES to discharge an employee. Once OBES has made that finding, OBES must deny benefits to that applicant whether or not there has also been a violation of the employee's equal protection rights. Any finding by OBES as to the presence or the lack of racial discrimination in a discharge decision is outside its statutory authorization and, therefore, not "essential" to its finding of just cause.

Therefore, this Court concludes that collateral estoppel should not apply because the racial bias issue was not essential to the OBES' core determination that there was just cause for the discharge of Parrish.

IV. CONCLUSIONS OF LAW

Based upon the foregoing, it is my decision, as a Special Master, that Plaintiff, Rhonda Parrish, failed to prove that discrimination on the basis or her race played a substantial part in the decision to terminate her employment on March 8, 1989. Therefore, it is my recommendation that her complaint be dismissed with prejudice, and that judgment be entered in favor of defendant, Riverview Nursing Home.

V. PROCEDURE FOR REVIEWING MASTER'S REPORT

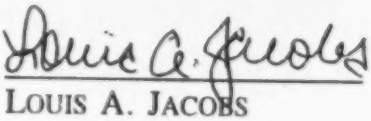
Pursuant to Fed. R. Civ. P. 53(e)(2), within ten days after being served with notice of the filing of this report, any party may serve written objections thereto upon the other parties. Application to this Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Fed. R. Civ. P. 6(d). The Court shall accept the Master's Findings of Fact unless clearly erroneous and may, after hearing, adopt the report or may modify it or may reject in whole or in part or may receive further evidence or may recommit it with instructions.

Fed. R. Civ. P. 53(e)(1) also requires that, in an action to be tried without a jury, a transcript of the proceedings of the evidence and the original exhibits shall be filed with this report. As of the date of the filing of this report, a transcript of the proceedings is not yet available. Consequently, the time by which parties may serve written objections to this report is extended to and including the tenth day after the date on which the transcript of the proceedings is filed. The Clerk of Court is directed to give written notice to the parties of the filing of the transcript of evidence.

/s [Terence P. Kemp]
United States Magistrate Judge

CERTIFICATE OF SERVICE

I, Louis A. Jacobs, a member of the bar of this court and counsel for Petitioner, hereby certify that three copies of the foregoing Petition for a Writ of Certiorari has been served upon Respondents, through their counsel, Ronald L. Mason, Esq., by placing them in an envelope with first-class postage prepaid addressed to him at Emens, Kegler, Brown, Hill & Ritter, L.P.A., 65 East State Street, Suite 1800, Columbus, Ohio, 43215, and dropping the envelope in a United States Postal Service depository this 4th day of June, 1994.



LOUIS A. JACOBS

Supreme Court, U.S.
FILED
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No. 93-1983

In The

Supreme Court of the United States

October Term, 1994

RHONDA J. PARRISH,

Petitioner,

vs.

RIVERVIEW NURSING HOME, INC., et al.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER MAGISTRATE JUDGE KEMP COMMITTED ERROR AS A MATTER OF LAW BY USING THE *McDONNELL DOUGLAS* ANALYSIS IN A TITLE VII RACIAL DISCRIMINATION CASE WHERE THERE WAS NO DIRECT EVIDENCE OF DISCRIMINATION.

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STATEMENT OF THE CASE

This is an employment discrimination case which was filed pursuant to Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e *et seq.* Petitioner Rhonda Parrish ("Parrish") was formally employed as a charge nurse by Defendant Riverview Nursing Home ("Riverview"). Parrish was terminated from that position on March 8, 1989 by Riverview's Director, Joe Pino ("Pino"), and contends that her dismissal was motivated by racial animus.

This action was referred to Magistrate Judge Kemp for the holding of an evidentiary hearing and the issuance of a Master's Report pursuant to 42 U.S.C. § 2000e-5(f)(5). Magistrate Judge Kemp issued a Master's Report on September 23, 1992, in which he recommended that Parrish's "complaint be dismissed with prejudice, and that judgment be entered in favor of Defendant, Riverview Nursing Home." (R. 60: Master's Report, p. 29, at B-26 of Petitioner's Appendix).

On November 9, 1992, Parrish filed several objections to the Master's Report (R. 65), and on December 8, 1992, Riverview filed a Memorandum in Opposition to Parrish's Objections. (R. 67). On December 29, 1992, after careful consideration of the evidence, United States District Judge Sandra Beckwith adopted the "extremely well-reasoned report" of Magistrate Judge Kemp. (R. 68). On January 29, 1993, Plaintiff timely filed a Notice of Appeal.

On March 4, 1994, the United States Sixth Circuit Court of Appeals issued a bench decision finding that Parrish suffered no discrimination in her employment, and further that Parrish "failed to prove that discrimination on the basis of her race played a substantial part in the decision to terminate her employment." (6th Cir. Ct. of Appeals, Bench Decision, at A-4 of Petitioner's Appendix).

STATEMENT OF FACTS

The statement of facts as set forth in the Petitioner's Brief is nothing more than a selective presentation of the facts that are arguably in her favor. Further, Petitioner's

Brief is replete with allegations and contentions that are unsupported in the record and which otherwise have no bearing on the important question in this case – whether Rhonda Parrish was terminated for violating a specific company policy or was that merely a pretext? Petitioner simply ignores evidence which directly contradicts her allegations and which support the Master's well-reasoned decision.

Because of federal and state regulations pertaining to the administration of narcotic drugs, such substances are required to be kept in a locked cabinet separate from other medications, and a written record showing the dispensing of and inventory levels of such drugs is required to be kept. As such, the nurses at Riverview are required to do a narcotic count at the beginning of their shift. Such procedures are typically learned by licensed practical nurses during their education and training, and the importance of maintaining an accurate record of narcotic drugs was known to all of the charge nurses at Riverview prior to such drugs being introduced into the facility in October of 1988. (Tr. II-26; Tr. II-182).

Throughout the entire trial of this matter, the *only* allegation of disparate treatment concerned the timing of when Parrish was required to do the narcotic count. Petitioner could only point to *one* circumstance in which she was allegedly treated differently than white nurses:

> Q. And that the only issue that you can recall where you have been treated differently than white employees is having to sign a narcotics sheet and to do the count at the beginning of your shift; isn't that correct?
>
> A. That is what I said.

(Parrish at II-73.)

This testimony is supported by Petitioner's charge of discrimination with the Ohio Civil Rights Commission, in which she stated: "I was the only black charge nurse, and also the only one required to sign a narcotics sheet upon arriving at work; *the others could sign the sheet at their leisure.*" (Plaintiff's Exhibit 2) (emphasis added).

However, contrary to Parrish's contention, all of the charge nurses at Riverview, including Parrish, knew that the narcotic count was to be done at the "beginning of the shift." (Jaye Bennett White: "It is the responsibility of the oncoming nurse to do the narcotic count at the *beginning of their shift*" (Tr. I-125) (emphasis added); Martha Duff: "What I can remember, I don't think I can remember all of the specifics, but when you come in *at the beginning of the shift* to count them and sign and how many there were" (Tr. III-168) (emphasis added); Katherine Bradley: "All nurses were required *at the beginning of their shift* to do the narcotic count while the other nurses were still present" (Tr. III-117) (emphasis added); Roxanne Butto: "The oncoming nurse counts the narcotics prior to the off going nurse, before she leaves. You usually do it *when you first come in* prior to report" (Tr. II-182) (emphasis added); Lorna Harms: "Count each morning on or before *the beginning of your shift*" (Harms deposition, p. 23) (emphasis added); Donnita Rine: "The nurse has to sign them *at the beginning of her shift*" (Tr. II-181) (emphasis added)).

Right up to the time of trial, Ms. Parrish steadfastly maintained that she was the only nurse required to sign the sheet at the beginning of the shift while all other

nurses could do the count "at their leisure." (Plaintiff's Exhibit 2). At trial, she admitted the following question and answer:

> Q. Now, you have testified that you are the only nurse that was required to sign the narcotic sheet at the beginning of your shift and that the other nurses could do it at their leisure?
>
> A. Or when they wanted to. They weren't required to do at the beginning.

(Tr. II-97).

Parrish habitually failed to timely sign the narcotic sheet at the beginning of her shift even though she knew that it was important (Tr. II-28), and in spite of the fact that she was repeatedly given helpful reminders by Mrs. White, the Director of Nursing, to do the count at the beginning of her shift. (Tr. II-38).

Even more outrageous, Martha Duff, the charge nurse who worked the shift immediately preceding Ms. Parrish, testified that she observed Ms. Parrish signing the narcotics sheet without doing an actual count of the narcotics. (Tr. III-170-171). That, standing alone, is a "dischargeable offense." (Tr. III-60).

The overwhelming evidence at trial demonstrated that Rhonda Parrish was a "problem employee." Annette Guild, the Director of Nursing when Parrish first started at Riverview, testified that Parrish was inconsistent, unprofessional, did not follow doctor's orders, failed to follow instructions, and failed to supervise her nurses aides. (Guild Trial Deposition, pp. 15-23). In fact, Mrs. Guild, whom the Master found to be extremely credible,

testified that Parrish "could be a danger to residents." (Guild Trial Deposition, p. 27).

Mrs. Guild's replacement, Jaye Bennett White, testified about many of the identical issues raised by Mrs. Guild. For example, Mrs. White testified that Parrish (1) was abusive to patients (Tr. II-210); (2) was unprofessional (Tr. II-2028); (3) would watch television during her shift (Tr. II-207); (4) failed to complete necessary paperwork (Tr. II-209); (5) failed to supervise the nurses aides (Tr. II-210); (6) inappropriately presigned the medex (Tr. II-209); and (7) "was the only nurse who showed a habitual problem with not signing the narcotic sheet." (Tr. II-215). As a result of her poor work history and her habitual failure to do the narcotic count at the beginning of her shift, she was fired.

Incredibly, Parrish finds it significant that she was "Employee of the Month" several months before she was terminated. (Petition for Writ of Certiorari, p. 5). This point couldn't be more insignificant. Mr. Pino, the Director of Riverview, testified on cross-examination that the "Employee of the Month" was a "random drawing", literally drawn out of a hat. (Tr. I-57).[1] At footnote 5 of Parrish's Petition for Writ of Certiorari ("Petition for Writ"), Parrish alleges that Mr. Pino was "immediately impeached" on this point. That is a blatant misstatement of what actually occurred. Not only was Pino not

---

[1] Parrish's Counsel: "So a lousy employee could be an Employee of the Month?"

Pino: "Possibly, yes."

Parrish's Counsel: "Purely at random?"

Pino: "Yes, sir."

impeached, he further testified that the "Employee of the Month", was "not based on skill or merit", but rather was "literally a random drawing with names in a hat." (Tr. I-79). There was *no* contradictory testimony.

Parrish also finds it significant that the "progressive discipline [policy] was suddenly abandoned in midstream." (Petition for Writ, p. 5). Once again, this point is insignificant. Riverview fired many *white* employees without following the disciplinary procedure: a white nurses aide was fired for failing to follow a direct order (Tr. II-219); a white maintenance worker was fired without benefit of the disciplinary procedure for poor work performance and receiving numerous phone calls (Tr. I-88); and a white nurses aide was fired without benefit of the disciplinary policy for poor job performance (Tr. I-80). In fact, even Katherine Bradley, the Director of Nursing's sister, was fired without benefit of the progressive disciplinary policy. The evidence at trial clearly established that Parrish was given more leniency and more warnings than many of the white employees.

Parrish is also critical of the Master for concluding that her failure to timely do the narcotic count, an important federally mandated company policy, was the last straw in a cumulative record of poor performance. (Petition for Writ, p. 6). Parrish's criticism of the Master on this point is because Pino allegedly "stated on five pretrial occasions, under oath, that the only reason for discharge was Ms. Parrish's failure to complete the form in a timely fashion." (Petition for Writ, p. 6). Parrish goes on, at footnote 7, to state that "no reference to this remarkable impeachment of the defense theory was made by the appellate panel, the District Judge, or the Master". What

Parrish failed to mention, however, is that this "remarkable impeachment" was never before the appellate panel, the District Judge, or the Master.

The alleged impeachment of Pino, acknowledged by Parrish in footnote 7 to have occurred at a "pretrial deposition", was never brought out at trial. This alleged "impeachment" was from a deposition and was never before the Master. Mr. Pino's trial testimony consists of well over 150 pages of transcript. Clearly, Plaintiff had ample opportunity to illicit needed information or impeach Mr. Pino. Respondent finds it remarkable to criticize the Master for failing to reference testimony that was never before him. To the contrary, Pino testified at trial that Parrish's prior work history played a factor in his decision to terminate her. (Tr. I-51-52). There was no impeachment of Mr. Pino on this point.

ARGUMENT

With the passage of Title VII, Congress announced that employers may not take race, sex, religion, or national origin into account in selecting, evaluating, or compensating employees. 42 U.S.C. § 2000e-2(a)(1) (1982).

Preliminarily, it is important to note that there are two distinct types of cases under Title VII: "single motive" or "pretext" cases and "dual" or "mixed motive" cases. The single motive or pretext cases are analyzed under the familiar three-part framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1918 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 420 U.S. 248, 101 S.Ct. 1089. The *McDonnell Douglas*

formula proceeds under the assumption that a single motive explains the employer's decision to take an employment action adverse to the plaintiff. *Haskins v. United States Dept. of the Army*, 808 F.2d 1192, 1197 (6th Cir. 1987). The shifting burdens of *McDonnell Douglas* are designed to determine which motive – the alleged unlawful discrimination or the employer's asserted nondiscriminatory justification – is the "true" reason for the employer's decision. *Terbovitz v. Fiscal Court of Adair County, Ky.*, 825 F.2d 111 (6th Cir. 1987).

The *McDonnell Douglas* formula is inapplicable, however, in dual or mixed motive cases. *Terbovitz*, 825 F.2d at 115. The United States Sixth Circuit Court of Appeals set forth in *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985) the guidelines for analyzing a dual motive Title VII case, including the burdens which must be carried by the parties on the issue of causation. In a 'ual motive case, once the Plaintiff "presents direct evidence of discrimination", the causation standard, or "same decision" test of *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), is applied. *Haskins*, 808 F.2d at 1197. Under the *Mt. Healthy* test, once a plaintiff has established that the illegal conduct was more likely than not a "motivating" or "substantial" factor in the employment decision, the defendant must be given the opportunity to show, by a preponderance of the evidence, that the same decision would have been reached in the absence of discrimination. *Haskins*, 808 F.2d at 1197. In the instant case, Petitioner completely ignores the distinction between single or mixed motive cases, and focuses instead on irrelevant semantical differences.

Under Title VII, a plaintiff may show unlawful discrimination through either direct or circumstantial evidence, or both. *Blalock*, 775 F.2d at 706-07. If a plaintiff attempts to show unlawful discrimination through circumstantial evidence only, or if the trial court does not believe the plaintiff's proffered direct evidence, then the evidentiary framework of *McDonnell Douglas* is the proper mode of analysis. *Terbovitz*, 825 F.2d at 115.

In the present case, there was no direct evidence of discrimination. This point is not in dispute. During the trial of this matter, arguing against a motion for directed verdict, plaintiff's counsel stated:

> In a race discrimination case like this obviously we are not required to prove our case by *direct evidence*. In this day and age it is difficult to find employers sufficiently naive that they would acknowledge openly racial stereotypic views or prejudice. I know it happens sometimes, but often you don't have racial remarks and so forth . . . [T]he law only requires us to show by *circumstantial evidence* that there was disparate treatment. In this case we have made our *prima facie case*. She was a member of the protected class, there was a job position. She was terminated.

(Tr. II-171-173) (emphasis added).

As can be seen, plaintiff's counsel readily admits there is no direct evidence of discrimination in this case. More telling, however, is that in order to avoid directed verdict, plaintiff's counsel argued the *McDonnell Douglas* formula (i.e. "we have made our prima facie case"). As there was no direct evidence of discrimination, the legal

standard that *must* be applied is the *McDonnell Douglas/ Burdine* formula. *Milligan-Jensen v. Michigan Technical Univ.*, 767 F.Supp. 1403 (W.D. Mich. 1971).

At page 14 of his Master's Report, Magistrate Judge Kemp stated:

> In this case, the legal standard relating to Parrish's claim that she was discharged in violation of Title VII is fully set forth on pages three through six of the Master's Report and Order which was filed on March 5, 1992. The Court will apply those same principals to the fact as they more fully appear from the record of the Master's Hearing.

B-15, Petitioner's Appendix.

In his March 5, 1992, Master's Report and Order, after a three page discussion of the legal standard to be applied, Magistrate Judge Kemp further stated:

> First, a claimant may, but need not, present direct evidence of an intent to discriminate. [Citation omitted]. If direct evidence of discrimination is presented, then the *McDonnell Douglas* analysis of a *prima facie* case is inapposite. [Citation omitted]. Otherwise, the claimant may make a circumstantial case of discrimination through the *McDonnell Douglas* prima facie case and through additional evidence that the nondiscriminatory reason advanced by the defendant is merely a pretext. [Citations omitted].

(Master's Report and Order, March 5, 1992, p. 5).

Petitioner was well aware of the legal standard to be applied by Magistrate Judge Kemp a full four months

prior to trial and never raised an objection. In fact, Petitioner was not only aware of the legal standard to be applied, she agreed with it. Petitioner's counsel, *in his opening statement*, isolated the issue as follows: "[T]he important question in the case; did Rhonda Parrish really violate a specific policy as to timing (sic) of signing the narcotics sheet, or is that something they made up as a *pretext*?" (Tr. I-15) (emphasis added).

Clearly, all parties agreed that the legal standard to be applied in this case was the *McDonnell Douglas* pretext formula. Under that formula, once the employer articulates a legitimate, non-discriminatory reason for the action taken, the plaintiff may succeed by either directly persuading "the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 101 S.Ct. at 1095. In the instant case, plaintiff did neither.

The plaintiff has attempted to argue that Magistrate Judge Kemp's legal standard was contrary to law. However, there are both Supreme Court and Sixth Circuit decisions that use the *exact same* language as used by Magistrate Judge Kemp. In his order, Magistrate Judge Kemp found that plaintiff failed to demonstrate that discrimination played "a substantial part" in her discharge. (Magistrate's Order, p. 29, Petitioner's Appendix, B-16). Plaintiff argues that the "*substantial factor*" language, used by Magistrate Judge Kemp, was a legal error as the correct burden requires use of the "*motivating factor*" language.

However, this Court has set forth the identical standard. In *Mt. Healthy*, the United States Supreme Court stated:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a *"substantial factor"* - ***or to put it in other words, that it was a "motivating factor"*** in the board's decision not to rehire him.

Mt. Healthy, 429 U.S. at 286 (emphasis added).

Justice White, in his concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) also noted *no* difference between the terms. Justice White stated:

> As in *Mt. Healthy*, the District Court found that the employer was motivated by both illegitimate and legitimate factors. And here, as in *Mt. Healthy*, and as the court now holds, *Hopkins* was not required to prove that the illegitimate factor was the only, principal, or true reason for the petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a ***substantial*** factor in the adverse employment action.

Price Waterhouse, 109 S.Ct. at 1795 (emphasis in original).

The Sixth Circuit likewise makes no distinction between "substantial" factor or "motivating" factor. See *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988) (["T]he plaintiff has the burden of proving that his speech was a 'substantial' or 'motivating' factor in employer's decision to terminate his employment"); *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064 (6th Cir. 1990) (" . . . if Mr. Canitia had been able to show that there was a

genuine issue as to whether his testimony . . . was a 'substantial' or 'motivating' factor in his discharge . . . "); *Proffitt v. Anacomp, Inc.*, 747 F.Supp. 421 (S.D. Ohio 1990) ("plaintiff need only demonstrate that gender was a *substantial motivating factor* in the employment decision . . . "); *Wilson v. Firestone Tire and Rubber Co.*, 932 F.2d 510 (6th Cir. 1991) (emphasis added) ("Under *Price Waterhouse*, such a burden on the defendant only arises where plaintiff presents direct evidence that unlawful discriminatory animus was a *substantial motivation* for the adverse action").

As can be clearly seen, the terms "substantial factor" or "motivating factor" are interchangeable. As plaintiff's entire objection regarding the legal standard utilized by Magistrate Judge Kemp is predicated on the distinction between these two terms, it must fail.

CONCLUSION

It is respectfully submitted that Petitioner has failed to establish any reason why the writ should be granted. In essence, Petitioner wants this Court to review the evidence so carefully considered by the Master. The Petition for a Writ of Certiorari should be denied.

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